FILE COPY

No. 361

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, APPELLANT

v.

COLUMBIA STEEL COMPANY, CONSOLIDATED STEEL CORPORATION, UNITED STATES STEEL CORPORATION, AND UNITED STATES STEEL CORPORATION OF DELAWARE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

REPLY BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

785984—48

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 461

UNITED STATES OF AMERICA, APPELLANT

v.

COLUMBIA STEEL COMPANY, CONSOLIDATED STEEL CORPORATION, UNITED STATES STEEL CORPORATION, AND UNITED STATES STEEL CORPORATION OF DELAWARE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

REPLY BRIEF FOR THE UNITED STATES

This brief is limited to two matters not discussed in our main brief which are necessary to a correct appraisal of the appellees' arguments.

I. U. S. STEEL WRONGLY CLAIMS THAT EVIDENCE SHOWING IT AND CONSOLIDATED TO HAVE THE LARGEST AND NEXT LARGEST SHARE OF 1946 STRUCTURAL BUSINESS IN THE CONSOLIDATED MARKET WAS REJECTED AS UNRELIABLE BY THE TRIAL COURT

U. S. Steel now asserts that the table showing the 1946 ranking of the ten leading structural fabricators in the eleven states comprising the Consolidated market (Pltf. Ex. 30, R. 564), which listed the first three as U. S. Steel, Consolidated,

and Bethlehem, in that order, was rejected by the trial court (Brief, p. 31) because it had been discredited on cross-examination (Brief, p. 42). That table is the sole evidence showing the relative amounts of structural fabricating business taken in this market by those companies and all other fabricators since the war and was received in evidence without objection (R. 418–419). The cross-examination of the witness who prepared the table, which is alleged to discredit it, actually affirmed its accuracy and no motion to strike was made.

The cross-examination (R. 421–432), to the extent that it dealt with the accuracy of the table at all, merely elaborated the direct testimony that the figures in this table differed from those used in a prior table prepared by the same witness and based upon contract awards to structural fabricators published in Iron Age, a trade journal (R. 416–417).[1] The differences resulted from checking the Iron Age figures by direct inquiries addressed to the fabricators themselves and an examination of their reports to the American Institute of Iron and Steel Construction. The fig-

[1] The suggestion of the cross-examiner that it was improper to use figures representing bookings rather than shipments (R. 430–431) was curious since his own table showing the structural business done by Consolidated and U. S. Steel relative to the total structural business done in the Consolidated market during 1937–1942 (Def. Ex. 50, R. 600–601), used bookings exclusively. Only by the use of bookings could comparable figures for 1946 be obtained.

ures reported by the fabricators were, of course, substituted for those reported by the trade journal wherever available (see Pltf. Exs. 33, 34, R. 565–567). All of the figures used in preparing the table and the source of each were supplied to counsel for U. S. Steel at the commencement of the trial (R. 418). They were subject to an immediate check by a telephone call to any company supplying them or to the Institute and were not offered in evidence until plaintiff's rebuttal (R. 416).

The failure of the defendants to offer any post-war figures for the total structural business done in the Consolidated market or for the total amount of structural business done by any other companies indicated that such figures would prove more harmful than helpful to their argument. In their trial brief, submitted at the beginning of the trial, counsel for U. S. Steel said (p. 12):

> U. S. Steel has about 14% of the structural steel business in the eleven states selected by the Government. It will be shown by reliable data that the acquisition of Consolidated will only bring its percentage up to about 20.5% in the eleven states.

The Government's table credited U. S. Steel with 12.9% of the total business in these states for 1946 and since the figure used for U. S. Steel had been supplied by it (R. 430), the difference between 14% and 12.9% was apparently due to a

pre-trial estimate by U. S. Steel of a slightly smaller total business in this market than the total business shown in the Government's table.

Consolidated's bookings for the entire year 1946 (Pltf. Ex. 30, R. 563) were not made available by it until after the close of plaintiff's case (R. 403, 415) and were evidently larger than U. S. Steel anticipated since they gave Consolidated approximately 10.9% of the 1946 structural business in this market instead of the 6.5% [2] which U. S. Steel apparently thought it could show before the trial commenced. The 10.6% attributed to Bethlehem in the Government's table was based upon a tonnage figure reported by Bethlehem to the Department of Justice for use at this trial (Pltf. Ex. 33, R. 565). Counsel's cross-examination was apparently intended to suggest that the Bethlehem figure was unduly low (R. 430), but the issue presented here would be the same even if Bethlehem's share of this market had actually been larger than Consolidated's.

It may be assumed that Bethlehem is a more potent economic factor in the western fabricating industry than Consolidated. Affiliation with rolled steel plants gives Bethlehem's fabricating subsidiaries the advantage of an assured source of raw material similar to that possessed by U. S. Steel, which neither Consolidated nor any other

[2] This is the difference between the 20.5% which U. S. Steel's trial brief asserted the Consolidated acquisition would give them and the 14% it said U. S. Steel then had.

independent fabricator has.[3] The fact that Consolidated is the most important independent structural fabricator serving this market remains undisputed. The proposed acquisition will eliminate for U. S. Steel competition from the largest structural fabricator in the Consolidated market which has had to rely for its share of the business in those eleven states upon the quality of its fabricating performance rather than a noncompetitive source of raw material. The Sherman Act necessarily comprehends the preservation of exactly that kind of competition and Congress reaffirmed its concern for the protection of independent competition when it enacted the Surplus Property Act of 1944. See 50 U. S. C. 1511 (b), (d), and (p).

II. THE EVIDENCE WHICH SHOWS THE PUBLIC INTEREST IN PREVENTING U. S. STEEL FROM ACQUIRING CONSOLIDATED TO SUPPLY AN ASSURED MARKET FOR GENEVA HAS BEEN IGNORED BY APPELLEES

U. S. Steel's argument that the public interest in preserving independent competition in the steel industry is outweighed by public advantages it says will accrue from guaranteeing a market for Geneva's plate and shape production at the expense of competing producers of rolled steel products, is contradicted by the circumstances surrounding the Geneva acquisition. U. S. Steel's established policy of discrimination against independent competition was at the bottom of the

[3] The term "independent fabricator" is here used as meaning a fabricator not affiliated with a producer of rolled steel.

original opposition of western interests to its purchase of Geneva. As counsel for U. S. Steel phrased the matter in his opening statement, many people argued that Geneva should not be sold to an eastern steel company "because the Eastern steel company would be interested not in making the Geneva operation successful, but in subordinating it to the needs of the Eastern steel market" (R. 130). When negotiations for disposition of Geneva were begun in the spring of 1945 by Defense Plant Corporation, the attention of Congress was directed to the long-standing discrimination against West Coast fabricators in rolled steel prices which supported that argument (Prog. Rep. of April 23, 1945, p. 8, Sen. Rep. 199, 79th Cong., 1st sess.).

The precise nature of this competitive injury was shown by the evidence in this case. Roach, president of Consolidated, had himself complained about this discrimination (R. 354),[4] which resulted from a basing point price system in which California mills were not basing points. U. S. Steel and Bethlehem operated rolling mills at Los Angeles and San Francisco, but sold the product of those mills at prices equivalent to their eastern mill prices plus transportation charges

[4] For a more detailed statement of his position see his letter of May 24, 1945, to Senator O'Mahoney regarding disposition of Geneva (Ex. 5, pp. 157–158, Joint Hearings Nov. 5, 6, and 8, 1945, before Senate subcommittee pursuant to S. Res. 129 and S. Res. 33).

from Atlantic or Gulf ports to the West Coast. Consolidated, therefore, paid the same delivered price for its steel, whether it was shipped from California mills or from Gary or Pittsburgh (R. 356). This price was about $10 to $15 a ton more than eastern plants paid for steel delivered at Pittsburgh or Gary (R. 356). This price differential permitted eastern fabricators to sell in the western market, while preventing western fabricators from selling in the eastern market (R. 358–359). Since the California mills of Bethlehem and U. S. Steel were believed to have costs comparable to those of their eastern plants, the inability of adjacent California fabricators to buy steel from the California plants at delivered prices comparable to those charged by eastern plants to fabricators adjacent to them was regarded as a price discrimination in favor of eastern fabricators (R. 356).

The Federal Trade Commission had in 1924 found price discriminations of this character by U. S. Steel against middle-western and southern fabricators to be illegal when it abolished "Pittsburgh plus." *In the Matter of United States Steel Corporation,* 8 F. T. C. 1, 21–28. The validity of that order is now under consideration by the Third Circuit Court of Appeals upon U. S. Steel's petition for review filed in 1938 (Pltf. Ex. 12, R. 531). The petition admitted that U. S. Steel had never fully complied with paragraph 2

of the order (R. 535) which prohibits pricing of rolled steel products upon any other basing point than a point of shipment or manufacture. 8 F. T. C. 1, 59. But in 1946, U. S. Steel formally admitted in that proceeding that under the 1945 decisions of this Court in *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726 and *Federal Trade Commission* v. *A. E. Staley Mfg. Co.,* 324 U. S. 746, the Commission's order is valid in so far as it requires the establishment of a base price at each point of production or shipment (Pltf. Ex. 13, R. 543–544). U. S. Steel claims, however, that the order should be modified to permit it to reduce a delivered price (without reference to its base prices) to meet a competitor's lower delivered price and the order will not become enforceable until this claim has been adjudicated (R. 115).

In view of this history, it was necessary for U. S. Steel to give assurance that Geneva would not become a part of this discriminatory pricing system when it bid for the plant, in order to satisfy the antitrust objectives of the Surplus Property Act. The U. S. Steel bid, therefore, included a representation that Geneva would be a basing point for products sold to the public on a basing point basis, which was immediately followed by the further representation that its operation by U. S. Steel would tend to "foster the location of steel-consuming manufacturing plants in the

Western States" (Def. Ex. 64, R. 656). There was no suggestion in the bid that any of Geneva's production would not be sold competitively, except the hot rolled coils shipped to California for cold reduction by Columbia. War Assets Administration recommended acceptance of U. S. Steel's bid and rejected all others (Def. Ex. 65, R. 674).

War Assets Administration's price-review board found, on the basis of the foregoing representations, that U. S. Steel's acquisition would "foster the development in the West of new independent enterprise"[5] by fostering "the location of steel-consuming manufacturing plants in the Western States" (R. 669) and this fact was noted and relied upon in the Attorney General's opinion approving the sale (Def. Ex. 66, R. 680).

U. S. Steel did make Geneva a basing point, a freight rate reduction from Geneva to the West

[5] At page 12 of the U. S. Steel brief the meaning of this finding may have been obscured by the doubtless inadvertent insertion of the word "a" before the phrase "new independent enterprise." The finding reads in full as follows:

"(p) It will foster the development in the West of new independent enterprise. The production of steel at the Geneva steel plant should serve to develop additional consuming markets for steel products in the territory naturally served by the plant, particularly in this postwar period when many companies are reported to be considering the location of additional steel-consuming facilities. One of the most important factors from the standpoint of consumers of steel is to have an assured source of supply. The operation of the Geneva steel plant as a part of the integrated operations of U. S. Steel should tend to foster the location of steel-consuming manufacturing plants in the Western States."

Coast was also obtained, and lower steel prices for West Coast fabricators resulted (R. 368). Steel is now sold by the California mills of U. S. Steel, Bethlehem, and Kaiser at a price approximately equivalent to the Geneva base price plus freight from Geneva to the Coast. But since the Geneva base price is $3 a ton more than the eastern base price, and the new freight rate from Geneva to the Coast is about $9 a ton, fabricators such as Consolidated, which are adjacent to California rolling mills, still pay about $12 a ton more for structural shapes than fabricators adjacent to eastern rolling mills (R. 358–359).[4] When and if the Federal Trade Commission's basing point order is enforced, the California mills will become basing points and Los Angeles and San Francisco fabricators, such as Consolidated, should then be able to buy rolled steel from those mills at prices comparable to those paid by Pittsburgh fabricators. The Consolidated purchase would eliminate from among U. S. Steel's western fabricating competitors the principal beneficiary of the order, since Bethlehem rolls its own steel.

Had U. S. Steel's bid for Geneva suggested that U. S. Steel proposed to acquire a controlled market for Geneva by purchasing this competitor, the War Assets Administration could not have found

---

[4] The approximate $12 per ton differential is derived by multiplying 64 cents (the difference between the $2.50 per hundredweight and $3.14 per hundredweight figures stated by Roach) by 20.

that Geneva's operation by U. S. Steel would foster independent enterprise. A purchase of any independent business to relieve U. S. Steel from the need to compete with others in selling rolled steel is so diametrically opposed to the aims of the Act that a statement of any such purpose in the bid would have compelled its rejection.

In selling Geneva to U. S. Steel for $40,000,000, the United States absorbed a $150,000,000 capital loss and thus gave U. S. Steel a modern plate and shape plant at a capital cost per ton of capacity lower than U. S. Steel's reproduction cost (R. 384). When taking this loss the Government had every right to suppose that U. S. Steel would not use the Geneva acquisition as an excuse for jeopardizing its still unliquidated investment in the similar surplus facilities operated by Kaiser, Inc. at Fontana, California, by acquiring the largest single market for plates and shapes rolled at that plant. The fact that the Fontana plant, in the short period of its operation, obtained a smaller proportion of Consolidated's business than U. S. Steel, under a system where California mills are not basing points, does not mean that this condition will prevail in the future. Far-western plate and shape mills, like far-western fabricators, have a freight rate advantage in sales to far-western consumers. Since the price of fabricated steel is much higher than that of rolled steel, freight is a larger factor in the delivered price of rolled steel and of even greater competitive significance to rolled steel producers.

Consolidated's purchases may, therefore, be of critical importance to mills competing with Geneva when the present abnormal demand for steel recedes since they have no such assured market as U. S. Steel possesses, even without Consolidated.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
JOHN F. SONNETT,
Assistant Attorney General.
CHARLES H. WESTON,
ROBERT L. WRIGHT,
ROBERT G. SEAKS,
VICTOR H. KRAMER,
Special Assistants to the Attorney General.

APRIL, 1948.

U. S. GOVERNMENT PRINTING OFFICE: 1948